

USDOL/OALJ Reporter

[*Bartlik v. Tennessee Valley Authority*](#), 88-ERA-15 (ALJ June 24, 1992)

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U.S. Department of Labor
Office of Administrative Law Judges
101 N.E. Third Avenue, Suite 500
Ft. Lauderdale, FL 33301

DATE: JUNE 24, 1992
CASE NO: 88-ERA-15

In The Matter of

ANDREW BARTLIK,
Complainant

v.

TENNESSEE VALLEY AUTHORITY,
Respondent

BEFORE: E. EARL THOMAS
ADMINISTRATIVE LAW JUDGE

REVISED RECOMMENDED DECISION

Andrew Bartlik filed a complaint on December 23, 1987, with the U.S. Department of Labor (DOL), alleging a violation of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). After investigation, the DOL's Wage and Hour Division determined on March 11, 1988 that the Tennessee Valley Authority (TVA) had discriminated against Bartlik because of his identification of safety problems in TVA's Sequoyah nuclear plant fire prevention program. After a full hearing, a Recommended Decision and order, issued September 21, 1989, concluded that the Wage and Hour determination should be sustained and recommended the payment of compensation by TVA.

The case was transferred to the Secretary of Labor, and briefs were filed by June 8, 1990. Complainant filed a Petition for Writ of Mandamus in U.S. District Court and a Remand Order (RO) was issued by the Secretary on December 6, 1991, directing the response to various questions raised in that Order. The initial recommended decision and order (RDO) was drafted primarily from the administrative law judge's notes which were

made contemporaneous with the hearing.¹ The Remand order directed that certain inferences and conclusions drawn in the

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initial RDO be supported with "explicit references to the record." For this reason, and due to the passage of time since the initial RDO, a revisit of the entire hearing record was required.

In remanding this case, after an obviously thorough review of the record, the Secretary determined that the credibility of three of TVA's top managers, John Hosmer, the Sequoyah plant Project Engineer, Douglas Michlink, Sequoyah Assistant Project Engineer, and Charles Fox, Vice President and Technical Director of Nuclear Power for TVA, was critical because knowledge of a protected activity on the part of an alleged discriminatory official is an essential element of an ERA violation. The Secretary concluded that the "focus of this case is on the actions, or failures to act" of these top officials as Bartlik's immediate supervisors and other managers, two and three levels above him, either supported his safety complaints or attempted to have his employment continued through personal service contracts.²

In addition to the issue of knowledge on the part of the alleged discriminating official(s), the Secretary directed the administrative law judge to substantiate the finding that after the transition from staff augmentation to managed task contracts, "TVA continued to deal with many of the same engineers [and] most, if not virtually all of the 2,100 engineers employed under the staff augmented program would continue employment under the new contracting arrangement." RDO at 3. Finally, the remaining area of significance which the Secretary felt was not adequately explained was Bartlik's involvement in the background of Revision 7 of Appendix R compliance, as well as including the subsequent formation of a multiple discipline task force, and how his involvement led to retaliation.

THE PROTECTED ACTIVITIES

The TVA has taken the position that the discrepancies Bartlik raised in TVA's fire protection program at Sequoyah were routine matters that previously had been considered and either dismissed as inconsequential or deferred to a time after the restart of that plant. TVA witnesses, Fox, Hosmer, and Michlink, sometimes referred to as "upper management," and Cooper, testified that the matters Bartlik raised did not require resolution prior to restart, and were not of sufficient import to

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cause concern by management. One of the inconsistencies noted by the Secretary between the testimony of Bartlik and Cooper, Assistant Chief of the Mechanical

Engineering Branch in the Knoxville Central Staff, and upper management regarding the need for work on instrument sense line integrity, points to the difficulty in resolving this and other related issues about the need for Appendix R work prior to restart. Bartlik believed the pre-start resolution of this item was essential and required a significant amount of work. Tr. 101. Cooper stated it was not a real problem and could be handled by TVA staff; however, he still tried to secure a contract for Bartlik to work on the instrument sense line CAQR.³ If the resolution of this item truly could have been handled by staff or postponed, the need for Cooper to request a continuation of Bartlik's contract would have been obviated.

Bartlik identified the problem of instrument sense lines during a study of TVA's Bellefonte plant, and subsequently discovered that the same problem existed at Sequoyah. He informed his superior, Mr. Pierce in the Mechanical Engineering Branch of TVA's Knoxville Central Staff, who instructed him to confirm this with Mr. McKelvey, an engineer at the Sequoyah plant. Tr. 102. After Mr. McKelvey issued a CAQR on the instrument sense line problem, Bartlik attended a meeting with Rick Daniels who recognized that the required design changes could impact the restart of the plant. Tr. 103. Bartlik prepared a second and third CAQR following the Electrical Engineering Branch's failure to cooperate in resolving the first report. In order to keep Bartlik's name out of the picture, Pierce prepared a fourth CAQR when the third was returned for inadequate documentation. Tr. 122.

There was a meeting of a number of engineers in September, 1987 with Rick Daniels, Jim Pierce, and Tom Luke to resolve the instrument sense lines CAQR prior to closing Sequoyah's containment. Tr. 125. According to Bartlik, it was recognized at that meeting that this item was a valid concern, and had to be resolved while the instrument sense lines were accessible. Tr. 126. Bartlik continued to work on the problem, but later was informed by Rusty Proffit in Licensing that the NRC felt that the instrument sense lines CAQR need not be resolved prior to restart. Tr. 128. Since there was no documentation to support this assertion, and because it seemed contrary to Bartlik's

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knowledge concerning Appendix R, he questioned the statement. An interdisciplinary meeting was held to try to work out a possible resolution; however, the Operations staff boycotted the meeting. Tr. 130. Glenn Morton, the new Appendix R Program Coordinator at Sequoyah, told Bartlik that the Operations people flatly refused to attend. Tr. 131. At this point, Tom Luke, head of Mechanical Engineering, prepared a staff augmentation contract so that Bartlik could continue to work on the problem. Tr. 133.

The contract proposal that Luke initiated was never approved, and Mr. Hosmer, Sequoyah Project Engineer, would have been the approving official. Tr. 134. Bartlik testified that significant work remained to be done on the instrument sense line CAQR at the time he left in November, 1987. It is reasonable to conclude that Bartlik would have

been in a better position than Cooper to determine the remaining amount of work because he discovered the problem and had done all the work on it up to that point.

Bartlik testified that in early 1987 he reviewed the design of the steam generator release valve and determined that there were design deficiencies. Tr. 63. He informed Mr. Pierce, the Appendix R manager, and proposed a design modification to resolve the problem. Tr. 66. Bartlik discussed the steam generator PORV with Rick Daniels at Sequoyah, who told him to make the necessary design changes in March, 1987. Tr. 68. Despite the Knoxville Central Staff Nuclear Engineering Branch's refusal to cooperate, Bartlik was told by Daniels that the changes were an emergency task, and had to be made. Tr. 68. The completed changes were submitted to the Nuclear Regulatory Commission (NRC), and became a TVA commitment, but there was resistance to their implementation by the Electrical Engineering Branch. Tr. 69.

In May, 1997, Bartlik received an excited phone call from Daniels who directed him to take TVA's helicopter and rush to Sequoyah to a meeting and explain why his design change was necessary. Tr. 70. Although the helicopter was not available, a conference call was held with Bartlik, Daniels, McKelvey and Doug Wilson, who was Project Engineer at Sequoyah before being replaced by Hosmer in August, 1987. During this conversation, Wilson abruptly cut Bartlik off and said that Bartlik did not understand the problem. Tr. 72.

After the conference call, Bartlik continued to work on the

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problem. When TVA failed to take action on it, he filed a CAQR. See CX 11. Bob Edlund, an engineer at Sequoyah, determined that the steam generator PORV CAQR was invalid. Bartlik told Edlund that he had support from other engineers for his position and was going to escalate the dispute by calling for a re-evaluation. He also suggested that since the issue was being escalated, Edmund might wish to inform his superiors at Sequoyah. Bartlik then met with Mr. Jones, Edmund's superior, and after that meeting, Pierce told Bartlik that Wilson went to Mr. Chandley, Mechanical Engineering Branch Chief, and suggested that Bartlik was wasting his engineers, time. Tr. 81. Mr. Cooper then took Bartlik off the Steam Generator PORV problem; nevertheless, a few weeks later he asked Bartlik how the project was coming. Tr. 84. Mr. O'Brien, the alleged TVA expert in single failure criteria, wrote a memorandum on October 30, 1987 to Jones in which he confirmed that the Steam Generator PORV was a valid safety problem. See CX 12.

Another problem discovered by Bartlik concerned inadequate documentation for "letdown" as mentioned in the RDO. In May, 1987, he spoke with John Henry Sullivan, Hosmer's technical adviser on Appendix R matters about this apparent inadequacy. Sullivan seemed obviously displeased that Bartlik had raised the issue. Tr. 94. After Sullivan refused to discuss the matter further, Pierce told Bartlik to keep working on it.

Tr. 95. In June, 1987, Bartlik brought this problem to the attention of Ed Sheehy in the Nuclear Engineering Branch. Sheehy agreed it was a legitimate concern and added it to the Revision 7 functional criteria requirements. Tr. 95-96. He later filed a CAQR, which required that the issue be resolved. After meetings to discuss the need for letdown, at which Bartlik and Sheehy disagreed with some Sequoyah engineers, the problem was discussed at a September 21, 1987 meeting with Pennel, Chandley, Cook, Wilson and Pierce. Tr. 98-99. There was another disagreement between Wilson and Bartlik as to whether letdown was required, and although Bartlik testified that there was general agreement as to its requirement among the engineers, the problem was not resolved prior to the time Bartlik left TVA. Tr.100.

The problem of unintended signals causing actuation of pumps, motors, etc., which was referred to as spurious operations, was also investigated by Bartlik. His involvement was similar to that in the letdown problem. After he discovered that spurious operations were not addressed in accordance with

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NRC requirements, Pierce, his supervisor, told him to look into the problem. Tr. 139-140. Bartlik met with Jim Hutson, the Electrical Engineering Assistant Branch Chief, who felt that the NRC had approved the design and seemed upset that Bartlik was looking into this particular aspect at a time when they were trying to restart the plant. Tr. 140-141. According to Bartlik, Mr. Sullivan, Chief of the Power Operations Review Staff, and the Head of Appendix R, was equally disturbed. Sullivan had allegedly been the person who received NRC approval for the design even though it neglected to provide for spurious operations. Bartlik drafted a memorandum explaining how the alleged NRC approval of TVA's Appendix R program could not be documented. This issue eventually wound up as an item in the August 28, 1987 memorandum to Mr. Hosmer. Tr. 142-144. Bartlik testified that Sequoyah management was concerned enough with this problem to discuss it at the October 19, 1987 meeting, and that there was widespread realization that its resolution would delay restart.

The Secretary's Remand order took exception to the recommended decision's analysis of the significance of Revision 7 to Appendix R, as well as Bartlik's involvement in its analysis. The Secretary's order, which reflects an in-depth study of the testimony and exhibits in this record, indicates that the Secretary was more impressed with a statement Mr. Daniels provided the DOL's Wage and Hour Investigator and an NRC Inspection Report than the testimony of Bartlik and Sheehy, who were initially the principal players in the Revision 7 effort.⁴ Although Revision 7 added matters that exceeded NRC requirements and the document may have eventually been disregarded, the events surrounding its short life and its apparent effect on those responsible for having Sequoyah restarted are perhaps more important than the document's legal significance. The following is a summary of the involvement of Bartlik and Sheehy in Appendix R.⁵ Their testimony, which was totally consistent with other record evidence on this issue and found to be credible, was not contradicted by other witnesses.

Ed Sheehy was the author of Revision 7 of TVA's Compliance with Appendix R. Bartlik provided substantial input in this report. Bartlik began working on Revision 7 in February, 1987, and after he reported problems with it to Pierce, his supervisor,

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he was directed to discuss them with Mr. Sullivan, a Sequoyah site engineer who was the Appendix R coordinator. Tr. 31. At that time, Doug Wilson was the Sequoyah Project Engineer before being replaced by John Hosmer in August, 1987. Tr. 31. Sullivan disagreed with Bartlik's technical assessment of some of the items and eventually refused to discuss the matter with Bartlik. Tr. 32. Although the lack of cooperation and disagreement were reported to Pierce, Bartlik was told to continue with his research and study of the problem. Tr. 32.

When Revision 7 was issued on July 14, 1987, none of the engineering branches reacted to its recommendations. Tr. 56, 376-377. Bartlik had convinced Rick Daniels that the problems he was studying in Revision 7 were serious enough to be a restart item. Accordingly, he drafted a memorandum on August 28, 1987, from Daniels to Hosmer, recommending the formation of a task force to examine all Appendix R problems. Tr. 34. This memorandum contained a substantial resource commitment and, contrary to TVA's assertions, there was recognition at the time that the memorandum revealed a number of deficiencies which could potentially affect restart of Sequoyah. This conclusion is bolstered by the fact that action was taken on the August 23, 1987 memorandum; specifically, personnel were selected for its study and potential completion dates were established. Tr. 35.

After Mr. Hosmer replaced Doug Wilson as the Project Engineer at Sequoyah in August, 1987, Sheehy spoke with him about the importance of Revision 7. At the time, Sheehy was also trying to secure a contract approved for an engineer named Mike Evans to work on Revision 7. When the August 28, 1987 memorandum was issued, Sheehy sat with Hosmer at lunch to carefully explain how TVA did not have enough documentation to support its compliance with Appendix R. Sheehy took Hosmer through the memorandum line by line, and was convinced that Hosmer understood the significance of the problem. Tr. 383.

A few days later, Hosmer called a meeting with Pennell and the engineering branch chiefs. Sheehy was excluded from this meeting. Although Sheehy made every effort to brief his Branch Chief, Doug Wilson, about the significance of the Revision 7 problems, Wilson would not give him an opportunity. As a result, Wilson went to the meeting unprepared, and assured Pennell that there were no problems. Tr. 384-385.

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Mr. Hosmer's testimony regarding Appendix R was evasive and contradictory. Although at times he denied that Appendix R had any restart implications, when pressed about specific deficiencies such as instrument sense lines, he recanted. Tr. 547. Moreover, he denied having knowledge of other details of Revision 7 or whether any of its requirements were imposed upon TVA by the NRC prior to restarting the Sequoyah plant. Tr. 548.

After his appointment to the TVA Board in August, 1987, Admiral White held daily meetings in the "war room" at Sequoyah with his branch chiefs. The purpose of these meetings was to eliminate obstacles that happened to interfere with the scheduled restart. Sheehy, who attended one or more of the meetings, testified that he felt sorry for any individual who happened to be the target of the day for those running the war room meetings. Tr. 390. The restart effort was described as "hectic and growing more hectic by the day." Tr. 389. There was constant overtime work, and a good deal of persuasion for engineers to " ... say that this is not safety, can you somehow justify not doing this now?" Tr. 389.

In September, 1987, Sheehy attended a meeting with Daniels, Hosmer, Boyll, and others, to discuss setting up the Appendix R Review Team. When Sheehy recommended that Bartlik be placed on the team because of his familiarity with Appendix R problems, Boyll, the Sequoyah site lead for fire protection, stated that "Andy's [Bartlik] a good man, but he finds more problems than he solves." Tr. 395. Mr. Pierce also had intended to put Bartlik on the Appendix R Review Team but the Sequoyah engineers reacted with hostility to the memorandum's recommendations and called Pierce and Bartlik "witch hunters." Tr. 39.

Even though Bartlik was not part of the team, he was called into Charlie Chandley's office to discuss the August 28, 1987 memorandum. Tr. 40. Chandley, the Chief Mechanical Branch Engineer, seemed to recognize that there were problems and set up a meeting on September 21, 1987 with Bill Pennell, Manager of the Knoxville central staff.⁶ At the meeting were Pennell, Wilson, the Nuclear Engineering Branch Chief who had just been replaced as the Sequoyah Project Engineer, Chandley, Cook, the senior mechanical engineer for fire protection, and Bartlik. Tr. 41. When Bartlik walked into the meeting, Wilson was present and was telling Pennell that there were no Appendix R problems at all.

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Bartlik corrected him by explaining the nature of the deficiencies and noted that other managers agreed with his assessment. Tr. 41. Mr. Wilson became visibly angered and hostile toward Bartlik. Tr. 42. An argument ensued between Wilson and Bartlik over whether Revision 7 was a valid document.⁷ There was also a discussion at the meeting over the Letdown CAQR which, although prepared by Engineer Mike Evans, was supported by Bartlik. Tr. 43. Bartlik told Wilson that the Letdown CAQR apparently had been suppressed, and Pennell expressed surprise this had happened. Tr. 45.

A second meeting was held on October 19, 1987, at Sequoyah to further discuss TVA's need to meet Revision 7 requirements. Present were Bartlik, Pierce, Wimbrow, Sheehy, Henry Jones, Bob Edlund, Frank Tanner, Morton, David Boyll, Sequoyah site lead engineer for fire protection, and Proffit.⁸ Bartlik attended apparently because of his technical expertise in Appendix R matters, and the fact that he had provided technical comments for Ed Sheehy, the principal author of Revision 7. Tr. 53-55. Dave Boyll said he did not want Bartlik involved in Appendix R compliance because "he finds more problems than he solves." Tr. 52.

During this second meeting, Tanner, an Electrical Engineering Branch Chief, became upset with Bartlik's comments and stormed out of the meeting because he felt the issues being raised would impact the restart schedule. Tr. 59-60. The minutes of this meeting were prepared by Sheehy, and distributed to Mr. Hosmer, among others, on November 23, 1987. See CX 9.

Although the TVA-NRC meeting on December 8, 1987 regarding Appendix R compliance occurred some two weeks after Bartlik's last day of employment, addressing it is relevant to show the final progression of events in which he was involved. On the evening of December 7, 1987, Sheehy and others explained to Hosmer that TVA could not maintain that it was in compliance with Appendix R at that time. Upon hearing this, Hosmer "went through the ceiling." Tr. 407. After determining that there was no one else to whom the blame could be shifted, Hosmer was receptive to the idea of establishing the recommended multi-disciplinary team. When names were suggested for members of the team, and Bartlik was specifically mentioned, Hosmer had a strong response of "I

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don't want any contractors working on problems which they discovered." Tr. 409. Although Hosmer agreed with the other suggested members, he substituted the name of a Bechtel contractor, whom he had known previously, for Bartlik. Tr. 410.

On the morning of December 8, 1987, prior to the NRC meeting, Hosmer held a meeting with his division chiefs. A consensus was reached that TVA would announce to the NRC its intention to set up the multi-discipline task force to review Appendix R compliance. Tr. 416. The team that was finally formed by John Hosmer issued a report on January 20, 1988. The report identified and addressed 29 concerns, 11 of which were generated all, or in part, by Bartlik.⁹ Some of the safety concerns raised by Bartlik were significant problems that required correction prior to the restart of Sequoyah. Tr. 430-431.

II. KNOWLEDGE OF DISCRIMINATING OFFICIAL

Although not specifically a part of the evidentiary record in this case, hearing testimony before a Congressional Subcommittee of the Committed on Energy and

Commerce¹⁰ which was attached to TVA's Brief, provides the following confirmation of the history of TVA's operating problems:

"At Sequoyah, there was an event involving the reactor core thimble ejection and a problem concerning TVA's handling of the qualification of containment pressure instrumentation....

.... At the operating Sequoyah facilities, TVA could not determine the status of equipment qualification in its equipment qualification program, and consequently TVA voluntarily elected to shut down the Sequoyah units in August, 1985.

The extended shutdown status of all five of the TVA operating plants is indicative of the general breakdown in TVA's management of its nuclear operations. During 1985, TVA recognized that this breakdown was of such a magnitude that major, new management changes were instituted to resolve its problems. Nuclear matters are now under control of a

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single individual, and TVA has brought new personnel into the line management to fill key management positions.

Mr. Stephen White is the new Manager of Nuclear Power at TVA.... 9

Admiral White hired Charles Fox from the U.S. Department of Energy to serve as his Deputy Manager of the Office of Nuclear Power. Tr. 625. As previously mentioned, Doug Wilson was transferred to the Knoxville central engineering staff, and John Hosmer took his place as the Sequoyah Project Engineer. Mr. Hosmer reported to John Kirkebo, the Director of Nuclear Engineering for TVA. Tr. 535.

Although Hosmer had primary responsibility, from an engineering standpoint, for restarting the Sequoyah plant, his authority vis-a-vis the Knoxville central staff was not clearly explained in the record. Tr. 536. Sequoyah project engineering had branches which apparently duplicated the Knoxville central staff. Some disputes mentioned in the testimony that arose between the two groups were resolved by Hosmer and William Pennell, manager of the Knoxville Mechanical Engineering Branch. Tr. 536. The Secretary found that Hosmer "managed" 3,000 TVA and contractor employees, which included about 1,000 engineers. RO at 7, N.3. Mr. Hosmer testified that he managed 3,000 employees, and Douglas Michlink, his Assistant, testified that one half of the 2,000 contract engineers were "involved" with the Sequoyah project. Tr. 506, 719. TVA had a number of its own engineers working on Sequoyah in addition to the contractor personnel, so neither the testimony cited by the Secretary nor the evidence cited by the parties reveals how many engineers Mr. Hosmer actually managed.

The issue of management responsibility for the engineers is important in determining whether Hosmer knew of Bartlik's activities. If Hosmer did not have ultimate supervisory responsibility over Bartlik or any of Bartlik's superiors, then it is possible that he did not know Bartlik or was not cognizant of the issues Bartlik raised. However, it seems that Hosmer's meeting with the engineering staff in Knoxville over the issuance of CAQRs is

some indication that he exercised management authority over at least part of the work of the central staff in addition to Sequoyah. Tr. 145, 510. Regardless of the

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supervisory chain, Mr. Hosmer obviously would be concerned about any engineer who created obstacles to the timely restart of Sequoyah, and even though Chandley and Cooper, Bartlik's bosses, did not report to Hosmer, he certainly had access to them.

When Hosmer arrived at Sequoyah in the Summer of 1987, he was briefed on issues that might impact restart by Doug Wilson. Tr. 536. Thereafter, he was informed on a timely basis of such issues. He additionally had an assistant named Key who monitored the activities of the Knoxville engineering staff. Tr. 546. A four person group in an office next to Hosmer did nothing but track CAQRs. Although there was a large number of CAQRs when Hosmer arrived, he reduced these in a short time to 200 or 250. Tr. 606. Considering the importance of CAQRs, and Hosmer's concern about engineers who unnecessarily raised safety issues, it is reasonable to assume that he could have been interested in knowing the names of engineers like Bartlik, who repeatedly initiated safety concerns. With 250 or fewer CAQRs, it would not be difficult or time consuming to discover who was generating the problems. This is particularly true in Bartlik's instance as he generated over one-third of all concerns addressed in the report by the Appendix R task force.

Mr. Holsmer, who was TVA's principal witness for engineering management, was adamant in his testimony that Sheehy issued Revision 7 without TVA approval, and that it contained commitments that were not required by the NRC. In his opinion, TVA's Appendix R compliance, as documented by Revision 6, had been approved by the NRC; therefore, the matters raised by Bartlik and Sheehy were not restart items and did not rise to the level that would deserve his attention. The relative unimportance of Appendix R compliance at that time was Hosmer's reason for not being concerned with it and for not knowing Bartlik. Due to the insignificance of removing unverified assumptions in Appendix R, Hosmer asserted that he quite naturally would not know, or care, who was working on Appendix R. Tr. 583, 584. Even on the day of the hearing, Hosmer denied knowing that Bartlik had any input into Revision 7. His explanation was that he receives hundreds of documents daily and is not concerned with the names of people involved; his sole concern is the work. Tr. 584.

Mr. Hosmer steadfastly maintained that there were no Appendix R problems of which he was aware of. Moreover, he

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proffered that the December 8, 1987 meeting with the NRC did not involve Appendix R. Tr. 582, 583. However, a November 30, 1987, memorandum from him to Renfroe and

Sheehy conflicts with this assertion. Specifically, the memorandum directed Renfroe and Sheehy to outline the physical modifications necessary for the restart of Sequoyah in the Appendix R area. Tr. 585-588. Hosmer further denied having a meeting with Sheehy on the evening of December 7, 1987. He also absolutely refutes that the Engineering Branch told him that Sequoyah did not comply with Appendix R on the day before the NRC visit on December 8, 1987. Moreover, he totally disagreed that the NRC mentioned any Appendix R problems during that meeting. Tr. 572-577. However, minutes of that meeting show that Appendix R calculations became a restart item as a result of that meeting. See, CX 40. Hosmer eventually admitted that he knew in the Fall of 1987, that TVA had to meet the requirements of Revision 7 prior to restarting Sequoyah. Tr. 583-584. Because of these and other inconsistencies, I did not find Mr. Hosmer to be a particularly candid witness.

The recommended decision and order found that Hosmer "knew [Complainant] and, either from first-hand information or supervisory reports knew about many, if not all of the problems which [Complainant] raised." RDO at 10. As mentioned previously, when Mr. Hosmer arrived at TVA he was briefed by Mr. Wilson, his predecessor. Wilson had had more than one disagreement with Bartlik over Appendix R requirements. Tr. 41-43. Although Hosmer claimed that the briefing covered only broad general issues and did not involve the names of individuals, this testimony was given little weight in view of the various contradictions.

Mr. Sullivan, who was Hosmer's technical expert at Sequoyah on Appendix R, knew Bartlik and had disagreed with him on the assessment of the need for rapid coolant system letdown. Tr. 32. Dave Boyll, the Sequoyah site lead for fire protection, had opposed Sheehy's recommendation to put Bartlik on the task force because he felt that Bartlik "finds more problems than he solves." Tr. 46. Boyll apparently would have been in a position to advise Hosmer on the composition of the task force.

Although Bartlik's name did not appear on the August 28, 1987 memorandum which recommended establishment of the task force, certainly Mr. Daniels, who was head of the Sequoyah

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Mechanical Engineering Branch, knew Bartlik was the author of that memorandum and most likely would have discussed the origin of such a potentially significant document. At least the document received Hosmer's attention, because he wrote on it "this is an example of what's going on in Appendix R." Tr. 44.

Although Mr. Hosmer, who knew Mr. Sheehy on a first name basis, Tr. 513, denied having a discussion with Sheehy about placing Bartlik on the Appendix R task force, I find Mr. Sheehy's testimony to that effect more persuasive and certainly more credible. Sheehy had a comprehensive recollection of all the events which surrounded the

Appendix R effort. Mr. Hosmer, on the other hand, selectively denied any knowledge of the problems involved.

A number of the Sequoyah site engineers had expressed disagreement with Bartlik and Sheehy. Tr. 37. It is reasonable to believe that word of these disputes could have reached Hosmer. In view of the various opportunities for Bartlik's name to reach Hosmer's attention, coupled with the fact that he was concerned that some engineers were expanding the scope of work beyond what was absolutely necessary to restart Sequoyah, it seems likely that Hosmer had discussions concerning Bartlik. For these reasons, the RDO found that Hosmer knew Bartlik. Minimally, he knew of him prior to Bartlik's termination on November 25, 1987.

There is also evidence that Mr. Hosmer knew about many, if not all, of the problems Bartlik raised. Hosmer admitted that by September, 1987, he was aware of Appendix R problems. Tr. 511, 512. Mr. Cooper testified that he and Hosmer discussed Appendix R problems in August, 1987. Tr. 1021. He spoke with Mr. Pierce about an instrument sense line CAQR in which Bartlik was involved. Tr. 537, 538. His engineers informed him of the spurious operations problem. Tr. 581. The steam generator PORV issue, which Wilson said was wasting his engineers' time, and which was escalated to higher management, would have been resolved at Hosmer's level. Mr. Hosmer had a staff of four individuals who worked on resolving CAQRs. Although there was no evidence presented as to who signed off on the final determination of each CAQR, it would appear that this responsibility rested with Hosmer, the Project Engineer.

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III. ALLEGED DISCRIMINATION (Refusal to extend personal service contract)

One of Bartlik's contracts expired at the end of August, 1987, and Mr. Cooper, his Assistant Branch Chief, arranged an extension through Mr. Brewington, the manager of Contract Services, to extend it to November 25, 1987. This was during the time when TVA was switching from staff augmentee to managed task contracts.¹¹ In September, 1987, Bartlik spoke with Pierce, Cook, and Cooper, about extending his contract which was due to expire in November. Tr. 153. Cooper instructed Cook to prepare a managed task contract for Bartlik, who actually wrote the first draft. Tr. 156. Cook then suggested that Bartlik contact one of the acceptable contractors who was providing managed task services for TVA and see if they would include him. Tr. 157. When General Physics indicated they were interested in Bartlik, Cook and Cooper determined that Bartlik could not choose the company himself, and they selected UE & C to be the contractor. Tr. 158. Cooper told Bartlik that he recommended him highly and Cook prepared a managed task package for him to work at Sequoyah. Tr. 161. It was common practice for TVA managers to recommend specific individuals to contractors. Tr. 162. This had happened in May of 1987 when TVA made arrangements for Bartlik to move to another firm after Gibbs and Hill lost their contract with TVA. Tr. 162. The managed task package for Bartlik was allegedly put on hold due to funding and then released again. Tr. 166.

The task package for Bartlik was submitted to Mr. Michlink¹² around November 18, 1987. He sent the package to Mr. Daniels, head of the Mechanical Engineering Branch at Sequoyah, for additional information. There was a meeting in Mr. Hosmer's office on November 19, 1987, and a contract was approved with UE & C for Appendix R work in the amount of \$80,000. *See* CX 30. A budget transfer in this amount was made to UE & C, and Michlink assigned a number to the task package. CX 49, Tr. 845, 853-854. A few days later, on November 24, 1987, Daniels sent the UE & C task package to Mr. Estes with a question "Is this for A. Bartlik?" *See* CX 23. After information was provided that the package was for Bartlik, it was not processed further. The next approval authority would have been Mr. Hosmer.

Although the managed task package for Bartlik was not finally approved or implemented, Mr. Hosmer did hire a Bechtel employee to serve on Appendix R task force. This person was involved in quality assurance programs, but was not a fire protection engineer. Sheehy believed he was not as well

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qualified as Bartlik. Tr. 432, 593; CX 27. Other contracts were approved, either by Hosmer or others on his behalf, for Appendix R work. Although these were dated February and March, 1988, there was evidence that TVA at times formally approved contracts after the authorized work had been completed; thus, this work could have been performed in the December through March time frame. Tr. 591-598; CX 27; CX 36. Apparently, there were four such contracts for outside engineers to do "close out" Appendix R work shortly after Bartlik departed. Tr. 596-598; CX 37.

Mr. Pierce testified that the work specified in the managed task package intended for Bartlik was eventually performed by TVA personnel instead of by contractors. Tr. 1071. Although this assertion is uncontradicted, it does not obviate the fact that contractors also were hired to work on the project.¹³ Mr. Pierce, a TVA employee at the time of the hearing, failed to adequately rebut the substantial evidence that Appendix R work was contracted out after Bartlik left. Neither Michlink, Fox, nor Hosmer satisfactorily explained this occurrence either.

Following the denial of Bartlik's extension, there was another attempt to contract for Bartlik's services for general Appendix R work by Steve Cook and Gary Davidson. Tr. 177. Davidson drafted a proposal which was sent to Jim Key. CX 18.¹⁴ This proposal was likewise rejected, even though a memorandum at that time authorized exceptions to the general staff augmentee prohibition. Tr. 178.

The Remand Order discusses an inconsistency between Bartlik's allegation that Tom Luke, the Acting Lead Mechanical Engineer at Sequoyah, had "proposed" a staff augmentation contract extension for Bartlik to work on the instrument sense line integrity problem and Mr. Cooper's testimony that only one or two weeks of work, which could be done in-house by TVA engineers, remained to be done in order to resolve the problem.

RO at 10, N.10. The issue, which is a credibility determination, is whether enough work had to be done on the instrument sense line integrity problem to warrant contracting it out.

George P. Cooper became Bartlik's boss when Cooper returned from an assignment as Assistant Project Engineer at Sequoyah in

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August, 1987. At Sequoyah, he apparently was Doug Wilson's Assistant, and when both left Sequoyah, he became the Mechanical Engineering Branch Chief. Bartlik was one of 50 engineers he managed, plus he "tended" to "about another 100." Tr. 993, 1011. At the hearing, Cooper could not recall what kind of work remained to be done on the instrument sense line; nevertheless, he insisted that it would have taken only one or two weeks. Tr. 1005.

It is difficult to reconcile Cooper's selective ability to remember, some two years later, that a job would have taken precisely one or two weeks with his inability to remember the nature of the job. It is even more incredible that he would remember a specific project, without some prompting, which he felt was relatively insignificant. This was a time when he had just returned to his job and was managing upwards of 150 people located on projects at four plants. Cooper's lack of precise recall is illustrated by the fact that, when asked about spurious actuation, another of Bartlik's projects, he testified that he had heard some discussion about it, but was not "technically cognizant" to the point he understood it. Tr. 1025. In a deposition taken some seven months earlier, Cooper stated that Bartlik's task package for instrument sense lines was turned down "because of a low priority placed on funding for non-restart. items." Tr. 1033-1035.

Since Bartlik was the person actually involved in performing the work, it is more likely that his recollection of the amount of work remaining on the instrument sense lines is more accurate than Cooper's. The project was obviously important to Bartlik, but to Cooper, it was merely one of possibly hundreds of relatively unimportant matters. For these reasons, I gave greater weight to Bartlik's testimony.

Douglas Michlink was an Assistant Project Engineer at Sequoyah with responsibilities to manage contracted engineering services. Tr. 717. The Remand Order placed significance on Michlink's testimony that, prior to the hearing, he had never heard of Bartlik and did not know that he was involved in Appendix R work, even though he had discussed a request for an extension of Bartlik's contract with Hosmer. Because Hosmer was Michlink's boss, it would not be surprising that Hosmer would fail to give him specific reasons for rejecting a particular contract. Michlink appears to have been a functionary who was

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not involved in an analysis of the work, but merely checked to see if the type of contract met certain criteria. Tr. 723-728. Although, as the Remand Order says, Michlink was involved in the contract approval process, he was not considered in the initial RDO to have the kind of involvement that would be determinative so far as specific engineers were concerned.

Mr. Michlink testified that he never approved any staff augmentation contracts for Appendix R work at Sequoyah after 1987, but the record shows that he specifically approved at least one staff augmentation contract for Mr. Whitset of Impel Corporation on July 12, 1988. CX 55. Tr. 888-890. Counsel also represented that there were other such contracts. Although Michlink said he did not know who Bartlik was on December 12, 1987, he admitted discussing the request for extension of Bartlik's contract with Hosmer. Further, he had reviewed and commented on the proposed managed task package for Appendix R work submitted by Daniels. Tr. 730, 786.

Mr. Michlink acknowledged that he received a memo from Mr. Key, Assistant Project Engineer, requesting an extension for Bartlik's contract on November 2, 1987. He reviewed it and discussed it with both Ricky Daniels and Hosmer before disapproving it. Key again brought up the request and he, Michlink and Hosmer discussed it. Hosmer decided that the contract should not be approved. Tr. 727-731. It is difficult to believe that after studying the memorandum and discussing it twice, neither Hosmer nor Michlink knew the beneficiary of the contract.

Not only was Mr. Michlink's role in the contracting process such that he would not have been the person to approve particular engineers, his evasiveness rendered his contribution to the record practically worthless. He was not a particularly candid witness, and he frequently relied upon technicalities to avoid direct responses to questions. For instance, fifty-one questions were required for Michlink to admit that not only was \$80,000 reserved for a managed task package for Appendix R work, but that the money was actually transferred to the United Engineers and Constructors account. Tr. 845-858. He constantly engaged in a war of semantics with counsel and appeared overtly hostile to Complainant. His evasiveness and lack of cooperation diminished the quality of his testimony to the point that it had little probative value. Consequently, Mr. Michlink's contribution was not considered particularly insightful in resolving the issue of

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knowledge by management officials.

Charles Fox was one of two deputy managers at TVA under Admiral White. Although he had the ultimate responsibility for contract approval beginning in the Summer of 1987, his position was such that he could well have not known about Bartlik until after Bartlik's departure from TVA. Indeed, he testified that the first time he learned of an Appendix R problem was on December 14, 1987. Tr. 669. on that date, he disapproved a memorandum from Mr. Kirkebo requesting an extension of Bartlik's contract by writing

"NO!" across its face and noting "surely we have someone in DNE that can coordinate these efforts." CX-22.

Although Dr. Fox asserted that he had no idea who the contract was for, and could have cared less when he disapproved it, Bartlik's name was certainly specified. CX 22, p.2. Moreover, Fox's testimony that he rejected the contract because it was for work on Bellefonte, a "mothballed" plant, contradicts the reason he wrote on the memorandum - that there were no "deliverables."¹⁵ Tr. 687. Dr. Fox asserted that the reason he did not indicate the mothballing of Bellefonte for rejection on the document was because this news had not yet been released to the public. Tr. 687. However, he later admitted that these contract proposals are never released to the public. Tr. 687. Assuming that to be true, his statement about mothballing seems rather contrived.

Regardless of these inconsistencies surrounding the disapproval of Bartlik's contract, Dr. Fox's involvement in the rejection of Bartlik's contract was similar to Michlink's. Neither had personal involvement with Bartlik and it seems highly unlikely they would have disapproved such requests without at least some discussion with the managers who were more directly involved in the work. Dr. Fox stated he was not aware of an Appendix R problem, and had to ask his Assistant, Rebecca Hansen, to investigate it. Tr. 669.

The first time TVA witness Rebecca Hansen heard Bartlik's name was December 15, 1987, when it was mentioned by Bob Bryans or Frank Koontz. Tr. 897. She knew that because of a note allegedly made on that date in her "Daytimers" notebook. Tr. 898. However, the actual date of that entry is questionable. The pages from the notebook for December 14 and 15 that were

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supplied during discovery contained these dates; however, the original pages from her notebook produced at the hearing did not contain the entries. Tr. 899-901. This is significant because Dr. Fox testified that he had never heard of Bartlik when he disapproved the request for a contract extension for Bartlik on December 14th.¹⁶ However, on December 11th, Dr. Fox told Ms. Hansen to "get smart" on Appendix R issues. If Ms. Hansen had heard of the Bartlik situation before December 15th, it is likely that she would have reported this information to Dr. Fox. Information about a troublemaker obviously might have prompted him to disapprove the proposal.

Ms. Hansen's explanation about how original filler pages in her notebook would not have had dates, whereas the ones supplied during discovery did, seems rather far fetched. Her explanation was that she remembered taking a blank page from the back, undated pages of her notebook on which to write notes about Bartlik, rather than making the note on the calendar-dated page. This recollection occurred some two years after making the entries. Tr. 903-914.

The Remand order directs that support be provided for the record analysis made in the RDO, that after switching from the staff augmentee to managed task contracts, "TVA continued to deal with many of the same engineers [and] most, if not virtually all of the 2100 engineers employed under the staff augmentee program would continue employment under the new contracting arrangement." RDO at 3. The point that was trying to be made was that TVA's reasons for Bartlik's demise seemed pretextual in view of the evidence. Given that there was no alleged reduction in number of engineers needed, under normal circumstances his employment should have continued. It seems clear that the urgency and amount of engineering work required at that time had not diminished, certainly at least until after Sequoyah was restarted.

TVA contended that one of several reasons why Bartlik's contract was not extended was that it had switched from a staff augmentee system where TVA managers hired and supervised contract engineers, to a managed task contract, where a contractor provided a "deliverable" (the task) and supervised its production. Although the Secretary agreed with the RDO's suggestion that the purpose of this switch was not specifically

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to eliminate Bartlik,¹⁷ she apparently adopted TVA's explanation that he just happened to be an unfortunate victim of this event. Bartlik's services were no longer necessary; therefore, it was mere coincidence that he was not hired by a managed task contractor.

By the end of May, 1987, TVA knew that it would need more engineers for emergency work on calculations for Sequoyah. Tr. 684. Dr. Fox testified that some \$350 million was allocated for Sequoyah engineering, and Mr. Hosmer said that the \$300 million restart project at Sequoyah was "probably the largest engineering scope of work in the United States at that time." Tr. 506, 648.

Dr. Fox admitted that many of the staff augmentees were "rolled off" into the managed task contracts. Tr. 683. He used the term "roll off," but the evidence dictates use of the term "roll over." By September, 1987, TVA had reduced the number of staff augmentee contracts from 2100 to 200. By December of that year, there were only 10 to 15 remaining. Tr. 680. However, by December, 1987, there was an actual increase in the total number of contracted engineers to 2,636. Tr. 682. It is interesting to note that Dr. Fox used the word *contracts* when he talked about reductions, and not the word *engineers*. In fact, TVA produced no evidence to show that there was any change in the identity or number of engineers as a result of the change in contracting engineering services. Therefore, it seemed reasonable to conclude that if the total number of engineers actually increased, most likely the individuals who worked under the old contracting system would be retained under the new one.

The Secretary concludes from Mr. Bryan's¹⁸ testimony that only a portion of the staff augmentees were hired by the managed task contractors,¹⁹ and the remainder were left without work as a result of the change over. This was not the undersigned's understanding

of his testimony at the hearing. Initially, United Engineers was only one of some 20 contractors, and its experience that 80% of their engineers under staff augmentee contracts were retained under the managed task system is not necessarily representative of other firms.

Mr. Bryans described the hiring situation with all TVA

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contractors at that time as being a "very dynamic market place." Tr. 842. He said that "all of TVA shell contractors were hiring personnel and trying to staff up." Tr. 842. Moreover, Bryans testified that he could not say where the other 20% came from. In discussing the 80% rollover figure, Byrnes commented "that's a large number of the people of the personnel that were currently working at the Sequoyah plant because, you know, the same tasks continue." Tr. 843.

The field of nuclear engineering is apparently highly specialized, and the category of nuclear fire protection engineers would seem to require even greater specialization. Although there was no evidence as to the universe of such engineers available, it was assumed that firms needing to hire engineers on a fast track would naturally pick local engineers who had been performing the job. The finding that "most, if not virtually all" of the staff augmentation engineers were retained by the new contractors was based upon these assumptions. Moreover, the record is devoid of any evidence to the contrary. When Complainant's attorneys represented that TVA submitted documents showed a correlation of 85 to 90 percent between the names of engineers working under the two contract programs, there was no dispute by counsel for TVA.

TVA's defense was that once a determination was made to contract for an engineering product ("deliverable") instead of engineering services, it no longer arranged for the services of any individual engineers. This assertion was not supported by the evidence. Although Mr. Michlink testified, as the Secretary noted, that TVA did not get involved in selecting the employees of a managed task contractor, Tr. 745, in actuality, TVA did play a role in the selection process. For instance, Mr. Fox admitted that after Bartlik left, he arranged for engineers George and Fiorvante to work on Appendix R. Tr. 675. Mr. Hosmer further testified that TVA could, and did, hire specific engineers through managed task contracts. Tr. 605. In fact, he would have arranged a contract for his friend, Rick Sphall, to do Appendix R work but Mr. Sphall was not available. Tr. 591-592.

An example of how the switch from staff augmentation to managed task contracts was not adhered to strictly was a situation in which Sheehy was trying to extend an engineer named Mike Evans to complete some work on Appendix R. Although he previously had been unsuccessful, Sheehy sat down with Hosmer at

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lunch and explained the need for Evans' services. After Hosmer understood the significance of Appendix R, Hosmer told Sheehy he could have anyone he wanted. He explained that all that was necessary to secure the contract of any individual was for Hosmer to demonstrate the necessity of the individual. Tr. 383. According to Sheehy's understanding, the criteria was not the kind of contracting; rather it was the nature of the work. Tr. 383.

The finding in the initial recommended decision that TVA could have either approved the extension of Bartlik's contract²⁰ or arranged for a managed task contractor to hire him is relevant to the issue of retaliation. TVA argued that the various contract proposals submitted for Bartlik were rejected because TVA had switched to a new system and was not contracting with individuals any longer.²¹ The type of services Bartlik provided were still required for the project. Had TVA not wanted to perpetuate the staff augmentee kind of contract, it could have arranged for Bartlik to continue employment under the new hiring system. As TVA did continue a majority of its staff augmentees under the managed task system, retaining Bartlik in this manner should not have posed a serious problem. Notably, TVA retained a significant degree of control over which engineers were employed under the new managed task system, Tr. 832-834. TVA retained the right to veto any engineer hired by a contractor, and it was considered good business by contractors to accommodate TVA by hiring anyone they requested. Tr. 829.

IV. CONCLUSIONS

The preceding discussion has been devoted to addressing questions raised in the Secretary's Remand Order, and to support the inferences and conclusions made in the recommended decision with "explicit references" to the record. However, it appears that the initial recommended order must be re-evaluated in light of the Secretary's determination that Complainant's cause cannot succeed unless a preponderance of the evidence shows that the three top managers, Hosmer, Fox and Michlink, who had final contract authority, knew of Bartlik and his involvement in the fire protection program at Sequoyah. RO at 6, 7.

There was no "smoking gun" in this case. There is no direct

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proof that Hosmer, Fox or Michlink actually knew of Bartlik. Moreover, neither Bartlik nor anyone on his behalf, could testify to the contrary. Although his name appeared on more than one contract proposal, all three managers denied having seen it or having heard of him. The evidence from which the initial decision concluded there had been discrimination was primarily circumstantial; however, it supported Complainant's position that his failure to continue employment was due to actions more deliberate than a coincidental change in contracting methods.

TVA argues that the only controversy surrounding Bartlik related to technical disagreements with other engineers, and that Michlink, Fox and Hosmer were not aware of a problem with Appendix R, and certainly did not consider it to be related to restart of the Sequoyah Plant. The Remand Order cites Mr. Daniells statement to the Wage-Hour investigator as the "most cogent explanation of the history of Revision 7." RO at 7. The statement maintained that the determination of the compliance of documentation with Appendix R, a task transferred to the Division of Nuclear Engineering during the late summer of 1987, was not related to the restart of Sequoyah. In Daniel's opinion, TVA was in compliance with Appendix R, and the formation of the task force recommended by the August 28, 1987 memorandum was merely to "retrieve and organize the information for future reference and audits." RO at 15.

The NRC Inspection Report of 1988, RX 21B, which is also cited as supporting Daniel's statement, confirms TVA's position that Revision 6 showed it was fully in compliance with Appendix R, and that Revision 7 went far beyond NRC's requirements. This disagreement between the Sequoyah operations staff and the central engineering staff over which revision was the proper criteria, and whether or not TVA was fully in compliance, was the heart of the controversy which Bartlik and Sheehy had a major role in generating.

Two letters from the NRC, however, reveal that it considered Bartlik's arguments to have some merit and that the Commission took this issue seriously. A letter from the NRC to Admiral White on February 26, 1988, states:

Recently allegations have been raised concerning the Appendix R evaluation of the Sequoyah units made by the Tennessee Valley Authority (TVA). To complete our

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evaluation of these allegations, the staff needs the information listed in the enclosure to this letter. *The staff considers the resolution of some of these allegations a restart item for Sequoyah Unit 2;* therefore, we need this information as soon as possible for us to meet your schedule for Unit 2. CX 47 (emphasis supplied).

It is assumed that the "staff" referred to in the NRC letter is NRC staff. A second NRC letter of March 16, 1988, CX 45, reveals that Bartlik may have been more than just a "witch hunter," as one portion states:

Although the NRC recognizes that you will likely appeal the Area Director's determination (Wage and Hour Division, DOL), the NRC is concerned that a violation of the employee protection provision set forth in 10 C.F.R. 50.7 may have occurred and that actions taken against Mr. Bartlik may have had a chilling effect on other licensee or contractor personnel regardless of whether a violation occurred. *These issues are of particular concern to the NRC in view of the fact*

that some of Mr. Bartlik's technical allegations have been substantiated during the NRC's review of the allegations. (emphasis supplied).

What appears from the record is that Bartlik's immediate supervisors certainly found enough merit in his suggestions to keep him working on the problems he discovered. There was ample evidence that more than one attempt was made to have his contract extended. As the NRC Report (RX 21B) states, the conflicts were created when the reported deficiencies rose to the attention of plant management who were responsible for ensuring that such problems were resolved prior to restarting plant operations. There would be a natural tendency for all but the most safety minded of such managers to be hostile to these delays.

Significantly, it is irrelevant whether the matters raised by Bartlik were of such great import that they would have been restart items; the true issue is whether Mr. Hosmer believed they might affect the restart effort. At the time Bartlik's contract was nearing termination, Hosmer had the primary responsibility for having Sequoyah restarted on schedule. Anyone seen as a obstacle to that mission obviously might not be viewed as a likely candidate for future contract employment.

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The fact that the NRC Inspection Report of March 14-18, 1988, RX 21B, found that Revision 7 may have exceeded the technical requirements of Appendix R is not particularly relevant. At the most, the NRC Report shows only after-the-fact that TVA was being overly cautious and that Revision 6's compliance with the Appendix R criteria was adequate. However, that document also could be viewed as effort by NRC to justify its original acceptance of Revision 6. Even if the Report supports Mr. Daniel's statement that the delay in formation of the task group was because it was not a restart item and therefore, not considered urgent, it does not explain why it seemed important enough to cause disagreements between the Central Engineering and Sequoyah staffs. RX 21B, Enclosure 2, page 1. If anything, this Report confirms that in the time frame immediately preceding Bartlik's departure, the August 28, 1987 memorandum generated sufficient controversy to at least cause a task force to be created. Notably, this creation was at a time when Mr. Hosmer and others testified they were deferring all items considered non-essential to restart.

Under the rule in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), which the Secretary cited with approval in *Atchinson v. Brown & Root Inc.*, 82 ERA 9 (1983), an employee must show that the adverse action taken by the employer was, more likely than not, the result of the protected activity. *Id.* at 10. According to the Remand Order, the employee must also specifically identify the discriminating official who had final authority for the personnel action, as well as show that that official knew, or at least knew of the employee. *Atchinson* would permit the discriminating official to be charged with constructive knowledge of the protected activity, but the Secretary apparently would not go so far to impart knowledge of the employee.

Of the three officials whom the Secretary has determined would have been in a position to retaliate against Complainant, Mr. Hosmer is the likely candidate because of his ultimate responsibility to have Sequoyah restarted on schedule. There was a good deal of pressure on Mr. Hosmer because of his responsibility, and there is no question he disapproved one of Bartlik's contracts. Nonetheless, there is no direct proof that he knew Complainant or was personally responsible for retaliation. Although the undersigned is convinced that one or

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more upper level managers deliberately prevented a renewal of Bartlik's contract, there is not sufficient evidence to identify who was responsible.

V. REVISED RECOMMENDED ORDER

A re-evaluation of the record evidence with the guidance provided by the Remand Order indicates that there is insufficient proof that TVA officials, who were responsible for approving Complainant's contracts or otherwise extending his employment, knew Complainant, or knew of him prior to determining not to provide for extensions of his employment. Accordingly, the initial recommended order is modified to recommend that the complaint of Andrew Bartlik be dismissed.

E. Earl Thomas
Administrative Law Judge

[ENDNOTES]

¹ Trial courts (and many administrative tribunals) generally do not provide citations to testimony or documents in decisions because findings usually state ultimate facts, not the evidence. *See Mining Co. v. Taylor*, 100 U.S. 37; *Miller v. Life Ins. Co.*, 79 U.S. 285; *Wilson v. Merchant's Loan & Trust Co.*, 183 U.S. 121; *Grayson v. Lynch*, 163 U.S. 468; *Fanning v. Murphy*, 126 Wis. 538, 105 N.W. 1056. In fact, in many courts, testimony is not even transcribed unless an appeal is taken. The implementing regulations at 29 C.F.R. § 24.6 require that the administrative law judge "issue a recommended decision within 20 days after the termination of the proceedings at which evidence was submitted." Normally, transcript is not received within this time frame.

² Bartlik was hired under an individual staff augmentation contract. TVA argued that his contract was not extended or reissued because the TVA had switched to a managed task contract by September, 1987 in which engineers were chosen by the contractor. The Secretary found this issue "largely irrelevant" as the change in contracting methods was not alleged to be a subterfuge for eliminating whistleblowers. RO at 3, N.3. While it is true that the primary purpose for this change was not to eliminate particular employees, it nonetheless gave management a chance to clean house and simultaneously shift supervisory responsibility to outside contractors.

³ A Condition Adverse to Quality Report (CAQR) was the documentation required to identify and report safety deficiencies or nonconforming conditions in the plant design.

⁴ Although the NRC Report, admitted as Respondent Exhibit 21-B, found that Revision 7 arose out of TVA's calculational review process, there was no evidence presented as to which manager directed this re-evaluation.

⁵ Sheehy was assigned to the Nuclear Engineering Branch, and Bartlik was assigned to the Mechanical Engineering Branch.

⁶ Pennell reported to Mr. Kirkebo, who at that time was Director of Nuclear Engineering.

⁷ Mr. Hosmer submitted Revision 6 to the NRC on October 1, 1987, despite the fact that Revision 7 previously had been adopted by TVA. Tr. 549-551. When he met with the NRC on December 8, 1987, Hosmer told them he was not aware that Revision 7 was the effective TVA document. Tr. 608-609, see CX 28.

⁸ Some names are mentioned only to point out the size of the group and the apparent significance of the meeting.

⁹ See statement of George P. Cooper on March 3, 1988.

¹⁰ *NRC Regulation of TVA: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 22 (1986).

¹¹ The memorandum of J.A. Kirkebo on March 24, 1987, acknowledged the transition from general service contracts to the new managed task contracts, but stated that TVA anticipated "establishing additional task completion contracts to accomplish the remaining work at Browns Ferry, Sequoyah, and Bellefonte for which TVA resources are not available."

¹² At that time, Mr. Michlink was on loan from Wilson's Nuclear Engineering Branch to Sequoyah, and was functioning as a contract administrator for John Hosmer. Tr. 168, 169.

¹³ The Remand Order notes that Michlink submitted a managed task package for Hosmer to Fox for approval of Appendix R work. RO at 10.

¹⁴ Davidson drafted the proposal identified as CX 18 after the first one was lost. Tr. 178.

¹⁵ "Deliverables" is apparently an engineering term used by witnesses through the hearing to refer to a product or service.

¹⁶ Dr. Fox also testified that he had not heard of Bartlik until December 23, 1987. Tr. 708.

¹⁷ One of the stated purposes for the change in contracting methods was to transfer supervisory responsibility. No doubt the avoidance of personnel problems was also a major consideration.

¹⁸ Robert Bryans was the United Engineers Project Manager for Sequoyah. In November, 1987, George Cooper asked him to hire Bartlik under a managed task contract. Tr. 808.

¹⁹ The number of contractors during the transition period was reduced from about 100 to 20, Tr. 657, but as previously mentioned, there was an actual increase in the number of engineers.

²⁰ Mr. Michlink testified that there were only five staff augmentation contracts approved for Sequoyah as of March, 1988, but previously he had told the Department of Labor investigator that there were 50 to 60 by that time.

²¹ For the period from September, 1987 to October, 1988, 177 personal services contracts were sent to ONP in Chattanooga for disposition. Of these 177 contracts, 155 were approved, nine were disapproved, ten were canceled, two were released and one was declined. CX 30, 34.